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CHAMBERS OF
THEODORE H. KATZ
US MAGISTRATE JUDGE

BY HAND

Magistrate Judge Theodore H. Katz
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Anwar v. Fairfield Greenwich Limited*, Master File No. 09-cv-0118

Dear Judge Katz:

We represent the Plaintiffs in *Anwar v. Fairfield Greenwich Limited*, Master File No. 09-cv-0118. We are requesting a pre-motion conference concerning a proposed motion for a declaration that the 120-day deadline for service under Rule 4(m) does not apply to three foreign defendants in this case, or alternatively, for an extension of time to serve these defendants until 90 days after the filing of the Second Consolidated Amended Complaint ("SCAC"), which is presently set for September 25, 2009.

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Under Rule 4(m), F.R.Civ.P., the time to serve the plaintiffs' Consolidated Amended Complaint ("CAC") expires today. While Rule 4(m) expressly states that the 120-day deadline does not apply to service pursuant to Rule 4(f) in a foreign country, under some circumstances an action against a foreign defendant might be subject to dismissal if the plaintiff has made no reasonable effort to complete service. *See, e.g.*, *USHA (India), Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (plaintiff conceded it had made no effort at service for two years); *Russo Secs., Inc v. Ryckman*, 159 F. App'x 294 (2d Cir. 2005) (no service attempts during eight years of litigation). Accordingly, in an abundance of caution, Plaintiffs are seeking confirmation that the Rule 4(m) deadline does not apply to the three foreign defendants here, or alternatively, an extension of time to complete service.

Plaintiffs have diligently sought to serve all defendants identified in the CAC, and have completed service on, or obtained waivers of service from, 38 out of 41 defendants, including multiple foreign defendants. Service is outstanding only as to three foreign defendants, Lion Fairfield Capital Management Ltd. ("Lion Capital"), Jan R. Naess ("Naess"), and Peter P. Schmid ("Schmid"). Lion Fairfield is a Singapore company without an agent in the United States. Naess is believed to reside in Norway, and Schmid in Switzerland. Given the expense and complexity of completing service in a foreign country, counsel for Plaintiffs has sought waivers from these defendants pursuant to Rule 4(d). Plaintiffs' counsel learned on August 19, 2009 that Lion Fairfield would refuse to waive service. We have not yet received responses from Naess and Schmid (who are not represented by counsel) on the waiver requests.

Defendants would not be prejudiced by an extension. Formal discovery in this action has not commenced, and answers are not due until 45 days after filing of the SCAC. (Order of June 9, 2009, Dkt. 168.) Moreover, we believe that all three unserved defendants are aware of the proceedings against them.

Plaintiffs' efforts to effect service, coupled with the lack of prejudice to defendants, are sufficient to warrant an extension of the service period. Rule 4(m) provides that "if the plaintiff shows good cause for the failure [to complete service], the court must extend the time for service for an appropriate period." *See, e.g., AIG Managed Mkt. Neutral Fund v. Askin Capital Mgmt., L.P.*, 197 F.R.D. 104, 108 (S.D.N.Y. 2000) (reasonable efforts and lack of prejudice support good cause finding); *Vinewood Capital, L.L.C. v. Dar Al-Maal Al-Islami*, 2006 U.S. Dist. LEXIS 80104 (N.D. Tex. Nov. 2, 2006). District courts also have "discretion to grant extensions even in the absence of good cause." *Zapata v. City of New York*, 502 F.3d 192, 196 (2d Cir. 2007).

Accordingly, Plaintiffs respectfully request that the Court set a pre-motion conference on these issues, or make a determination that the Rule 4(m) deadline for service of process does not apply to these foreign defendants, or alternatively, grant an extension of time to complete service until 90 days after the filing of the Second Consolidated Amended Complaint.

Respectfully yours,

David A. Barrett

cc: Counsel of record (via electronic mail)

The time to complete service on the foreign defendants is extended to 90 days after the filing of the Second Amended Complaint.

SO ORDERED

8/25/09

THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE